In the Supreme Court of the Hawaiian Islands—In Banco. October Term, 1888.

LORRIN A. THURSTON, MINISTER OF THE INTERIOR, vs. C. R. BISHOP, S. M. DAMON, C. M. HYDE, C. M. COOKE AND J. O. CARTER, TRUSTEES OF THE ESTATE OF MRS. B. P. BISHOP, DECEASED.

BEFORE JUDD C. J., M'CULLY J., PRESTON J., HARTWELL J., DOLE J.

Opinion of the Court per JUDD C. J.
(Mr. Justice Dole dissenting.)

This action was brought at the April term, 1888, of this Court. The jury was waived and the case heard by Mr. Justice Dole in vacation, by consent of parties. The following is the decision of the Court rendered on the 24th July:

"This is a suit in ejectment in which the plaintiff claims for the Government the Ili of Opu, on the ground "that it has never been, and is not now awarded, patented, granted or leased under or by virtue of any land award, royal patent or Government grant or lease, and that by the law applicable in such cases, the Hawaiian Government is the absolute and unlimited owner thereof," or in other words, that the Government by virtue of its sovereignty, is the owner of all lands which are not held by some title proceeding from itself.

The defendants on the other hand claiming the ownership of this land from a period anterior to the establishment of the Hawaiian Government as a separate authority from the will of the King, offer two distinct lines of defense as follows: (1st), That Kamehameha III. was the sole owner of all the lands of the Kingdom, by virtue of the sovereignty which he received from his predecessors, subject however, to certain undefined rights of chiefs and people, and that having satisfied such rights by the concessions which were carried out by the Land Commission and the *Mahele*, the ownership of other lands not disposed of remained in him, and has descended to his heirs; and the land in dispute being one of such unassigned lands, now legally vests in the defendants; and (2d), That the chief, Hoapili, was formerly in possession of this land, and was the recognized owner thereof, according to the ancient system of land tenure; that when he died, in 1840, he gave it or left it, by oral bequest, to Lot Kamehameha, since Kamehameha V., then about ten years old, and that it was held for and by Lot Kamehameha without interruption, until his death in 1872, and thereupon vested in his heirs.

There is little dispute as to the facts in the case. It is admitted by the plaintiff that Hoapili was in possession of the land and gave it to Lot Kamehameha in 1840, and that the latter afterwards enjoyed it until his death. It is also conceded by the plaintiff that the defendants are entitled to whatever interest was in Lot Kamehameha at his death.

The two lines of defense are inconsistent with each other, or may be said to be in the alternative. The evidence adduced in support of the second line of defense, and the facts admitted by the plaintiff, authorize me to find, as a conclusion of fact, that Hoapili held this land for an indefinite period and transferred it to Lot Kamehameha in 1840, and that the latter enjoyed it until his death.

With this finding of fact, I need not consider the other line of defense, based upon the sovereign title of the King, as by the Declaration of Rights announced in the year 1839, protection was assured to all persons with their lands and other property, with the guarantee that "nothing whatever shall be taken from any individual except by express provision of the laws." (Old Laws, 10). This Act divested the King of his sovereign right of control of the Ili of Opu, and gave Hoapili and his representatives an interest in it, which, under the provisions of the law creating the "Board of Commissioners to Quiet Land Titles," generally known as the Land Commission, enacted December 10th, 1845, and the "Principles adopted by the Board of Commissioners to quiet land titles, in their adjudication of claims presented to them," August 20th, 1846, and approved by resolution of the Legislative Council October 26, 1846, became a claim to land, which should have been presented to the Land Commission for adjudication before February 14, 1848. There can be no doubt that the Land Commission was authorized to recognize private interests in lands by virtue of royal grant or gift made orally and anterior to 1839. "For the purposes of this Board in all cases where the land has been obtained from the King, or his authorized agent without a written voucher, anterior to the 7th of June, 1839, the Board will inquire simply into the history of the derivation: and if the land claimed has been continuously occupied, built upon, or otherwise improved, since that time, without molestation, the Board will, in case no contests exist between private claimants, infer a freehold less than allodial." (Principles of the Land Commission, 2 Statute Laws, 92).

It is admitted by the defense that no claim for this land on behalf of Lot Kamehameha, was presented to the Land Commission according to law. Under these circumstances therefore, it is clear to me that the land in question vested in the Hawaiian Government by virtue of the failure to present the claim for it to the Land Commission as aforesaid, unless there were circumstances which excepted Lot Kamehameha from the operation of the rule of the Land Commission, barring claims not presented in time. (1 Statute Laws 109, Sec. 8. 2 Statute Laws, 93). Counsel for defendants claim that there were such circumstances in the fact of Lot Kamehameha being a minor during the time when claims might be presented. It is not denied by the plaintiff that he was a minor during such period, and the evidence shows that he was born in 1830, and consequently was less than twenty years of age at the termination of the time for presenting claims, on the 14th of February, 1848. Twenty years was fixed as the age of legal majority by the Act of 1845 to organize the Executive Departments. The law authorizing the appointment of the Land Commission provides that claims not presented within the required period "shall be forever barred in law, unless the claimant be absent from the Kingdom and have no representative therein." (Statute Laws, 109 Sec. 8). No exception is made in the case of a minor. The Declaration of Rights guarantees "that nothing whatever shall be taken from any individual except by express provision of the laws." Would the destruction of a minor's rights for failure of due presentation of his claims be a taking of his property by express provision of the laws," within the meaning and intent of the Declaration of Rights? It does not seem to me that such an application of legal proceedings could have been contemplated. But it may be argued, Lot Kamehameha, though a minor, was or might have been represented by his father as his natural guardian. As a matter of fact, I find from the public record of the *Mahele*, that Kekuaiaoa, his father, signed the *Mahele* deed, in regard to other lands for his son, Lot Kamehameha, signing himself as father and guardian. He might undoubtedly, under the then existing statute, have presented a claim for the Ili of Opu to the Land Commission on behalf of Lot Kamehameha, but he did not, and the question is, can his, or anyone's failure to do so prejudice the rights of his minor son?

"An infant shall lose nothing by non-claim, or neglect of demanding his right, nor shall any other laches or negligence be imputed to an infant, except in some very particular cases." (1 Wendell's Blackstones Com. 464). "The Court will protect the rights of infants where they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it on their behalf." (*Stephen et al. vs. Van Buren et al.*, 1 Paige 479—*syllabus*). "The general rule of the present day is, that an infant shall be bound by no act which is not beneficial to him." (Schouler's Dom. Rel. 532). "One leading principle runs through all cases which relate to infants. It is that such persons are favorites of the law which extends its protection over them, so as to preserve their true interests against their own improvidence, if need be, or the designs of others." (*Ibid*). From these authorities it would appear to be the correct conclusion of law that Lot Kamehameha was not barred of his rights in this land from his or anyone's failure to present his claim within the time required by law, and I so rule. After he became of age there was no opportunity afforded for the presentation of his claim, unless it is found in the two Acts for the relief of certain Konohikis, approved August 10, 1854, and August 24, 1860, respectively, but as both of these Acts relate only to Konohikis who were entitled to lands under the *Mahele*, they offered no opportunity for obtaining an award to the Ili of Opu, as it was not among the lands divided by the *Mahele*.

Under these principles, therefore, and the evidence submitted, I do not find a right of possession to this land in the plaintiff, and order judgment to be entered for the defendants.

To the rulings of law therein made the plaintiff excepts as follows:

This was an action of ejectment, in which the plaintiff claimed, as Minister of the Interior, to be entitled to the possession of certain land described by metes and bounds called the Ili of Opu, as "part of the public or government lands of the Kingdom, which has never been and is not now awarded, patented, granted or leased under or by virtue of any land award, royal patent or government grant or lease, and that by the law applicable in such cases, the Hawaiian Government is the absolute and unlimited owner thereof, and that the said land herein claimed, and the right to the possession, custody, charge and supervision thereof are by law vested in the plaintiff as such Minister of the Interior."

The Court found upon the evidence that the said land has never been, and is not now awarded, patented, granted or leased, under or by virtue of any land award, royal patent or government grant or lease, except a certain ancient lease now expired, of which a copy is on file marked Exhibit L.

The Court also found upon the evidence and upon the plaintiff's admissions, that the said land was in the possession of the chief, Hoapili, up to his death in 1840, and that he gave or left it by oral bequest to Lot Kamehameha, afterwards Kamehameha V., then about ten years old, who thereafter, until his death, in 1872, held and occupied it without interruption, and that whatever title therein was held by him at his death has descended and become vested in the defendants.

The Court also found as a fact that at the date when the time for filing claims before the Land Commisioners had expired Lot Kamehameha was between eighteen and nineteen years of age.

The Court also found upon the evidence that Kekuanaoa, the father of Lot Kamehameha signed the "Mahele Deed" in regard to other lands of his said son, than that claimed in this action, but that no claim to this land called Opu, was ever presented to the Board of Commissioners to quiet titles in land.

The Court ruled as a matter of law that said Lot Kamehameha was not barred of his rights in said land called Opu, by reason of his own or anyone's failure to present such claim within the time required by law before the Board of Commissioners to quiet titles in land, basing such ruling upon the fact of said Lot Kamehameha's nonage.

Wherefore the Court ordered judgment for the defendants, to which judgment, as well as to said ruling of law, the plaintiff duly excepted and such exceptions were allowed by the Court."

BY THE COURT.—The sole question which is presented by these exceptions, is whether the law was correctly laid down by Mr. Justice Dole, that Lot Kamehameha was not barred of his rights in said land called Opu, by reason of his own or anyone's failure to present such claim within the time required by law, before the Board of Commissioners to quiet titles in land, by reason of the non-age of the said Lot Kamehameha.

The decision of Mr. Justice Dole, that under the circumstances, (to wit, that no claim to this land had been presented before the Land Commission within the time for filing such claims,) "the land in question vested in the Hawaiian Government," * * * "unless there were circumstances which excepted Lot Kamehameha from the operation of the rule of the Land Commission barring claims not presented in time"—is not now open to review, it not being excepted to by either party. We proceed, therefore, to the question whether the infancy of the defendants' ancestor excepted him from the effect of the statute, and prevents the Hawaiian Government from now recovering the land of those who claim the right of possession to the land through him. But in this discussion it will become necessary to review the nature of the claims for landed property, or rights in land which existed prior to the Land Commission, and also the nature of the statutes establishing the powers and jurisdiction of the Commission, in order to properly decide the remaining question.

There is a time in the history of every original nation, not formed by colonization when, as it emerges from barbarism into civilization, titles to land may be said to have a beginning by positive institution of the people of such nation. Previous to the advent of Christianity to this country, in the early part of this century, Kamehameha I., as King, by right of conquest, was the lord paramount and owner of all the land of this Kingdom. This right continued in his successors until the reign of Kamehameha III. Under this King a government, under a constitution and laws had its birth, superceding a government of the arbitrary will of the King.

Claims of one character and another to the possession of land had grown up, but there was no certainty about them, and all was confusion, and, finally, after years of discussion had between the King, the chiefs and their foreign councillors, the plan of a Board of Commissioners to Quiet Land Titles was evolved, and finally established by law, for the purpose of settling these claims and affording an opportunity to all persons to procure valid paper titles emanating from the Government representing the sovereignty, the source of all title to land in this Kingdom, to the land which they claimed. As a part of this scheme, Kamehameha III., with unexampled magnanimity, relinquished his claim of ownership as sovereign, to over two-thirds of the entire territory of the Kingdom, in order that the same might be awarded to the chiefs and common people by the Land Commission. The Commission was authorized to consider possession of land acquired by oral gift of Kamehameha I., or one of his high chiefs, as sufficient evidence of title to authorize an award therefor to the claimant. This we must consider as the foundation of all titles to land in this Kingdom, except such as come from the King, to any part of his reserved lands, and excepting also the lists of government and fort lands reserved. The land in dispute in this case is not one of those specifically reserved by the King, Kamehameha III., to himself and his successors, and not being in the lists of lands specially set apart as government or fort lands, must be one of those over which the Land Commission had jurisdiction to award to the claimant.

The Land Commissioners were by Section 1 of the Act creating it (p. 109 Stat. 46) a board for the investigation and final ascertainment or rejection of all *claims* of private individuals whether natives or foreigners, to any landed property acquired anterior to the passage of this Act, (10th December, 1845).

Section 8 of this Act prescribed that "all claims to land as against the Hawaiian Government which are not presented to said Board within the time, at the place, and in the manner prescribed in the notice required to be given, in the fifth Section of this Article, shall be deemed to be invalid and shall be forever barred in law, unless the claimant be absent from the Kingdom and have no representative therein."

It is clear from a reading of the "Principles" adopted by the Board of Commissioners to Quiet Land Titles in their adjudication of claims presented to them, that the "whole power of the King to confer and convey lands to which private equitable claim now attaches reposed in the Commission," (p. 85) which, as fully explained thereafter, means "the King's private or feudatory right as an individual participant in the ownership."

But it is argued by the counsel for defendants that "this land is not claimed of the Government, but it is claimed under grant from Kamehameha I., to Kameiamoku, father of Hoapili, and from the latter it passed to Lot Kamehameha." That the "Government" in this sense means the King, as representing the Government, is clear from the text of the "Principles," p. 82, "that the King really owned the allodium in all the land of the Kingdom, and the person in whose hands he placed the land, holding it in trust." Also these principles declare that the Act of 1839 (Declaration of Right, p. 10) "recognizes but three classes of persons having rights in the land, the King or Government, the landlords and the tenants." And on p. 83, it is further set forth, "that there were but three classes of persons having vested rights in the lands, (1st), the Government, (2d), the landlord, (3d), the tenant."

The whole context of these "Principles" shows that the land tenures of this Kingdom were to be settled on the basis that the King—meaning the State or Government—had one-third of any given land held by a landlord (generally a chief) and if it had tenants upon it (if all parts of the land were equally valuable) the landlord would take one-third and the tenants the remaining third. An allodial title would be given by the Land Commission to the lord (the chief) an allodial title in severalty to the tenants and a third would remain in the King, or Government. The terms "King" and "Government" are, as we see, used interchangeably. They mean the "State" in each case.

A fee simple was obtained by the lord by extinguishing the right of the King, either by a payment in money or by a surrender of other lands in value equal to the King's interest in the land. This is called the "Government's Commutation," and the money paid or the lands surrendered, invariably went to the Government. On page 93 of the "Principles," it is stated that "the share of the Government, or the body politic, to be commuted for with the Minister of Interior, etc., etc., should extinguish the private rights of the King in the land." The object of this discussion is to show that Section 8 of the Act of 1845 is correct in its phraseology when it recites that all claims for land "*as against the Hawaiian Government*" must be presented, etc. As is forcibly said on page 83 of the "Principles," "claims for land even by purchase or gift from the King, must be presented to the Commission for adjudication." "Such ownership must be proved or it cannot be acknowledged, for the King *representing the Government*, having formerly been the sole owner of all the soil, he must be considered to be so still unless proof be rendered to the contrary: and even *possession of ever so long standing* cannot be proof," etc. "The Land Commissioners, by virtue of their appointment from the King, had conferred upon them all his private and public power over the corporate property in lands claimed by private parties, which in the nature of things he can delegate," (p. 87 of Principles).

Certainly the Land Commission was not authorized to hear lawsuits between private individuals, as regards the ownership of land. There were courts established with this jurisdiction. It was only when there was a counter claimant intervening, that the Land Commission was called upon to decide which had the best claim as against the State. In such case each party had to present his claim against the King of Government, as the source of all title. It has been uniformly held, sustaining this theory, that where two awards of the Land Commission cover the same territory, the earlier award prevails.

It must be remembered that these "Principles," however much they may be criticised at the present day, were statutory law, having been adopted by the Legislative Council, consisting of the Nobles and Representatives, on the 26th October, 1846, and "all claims for landed property shall be tested by those principles and according to them be confirmed or rejected." (Stats. of 1846, p. 94).

A notice was published by the Commission "to all claimants of lands in the Hawaiian Islands," dated 11th February, 1846, viz: "All persons are required to file with the Board, by depositing with its Secretary specifications of their claims to land, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands before the expiration of two years from this date, or in default of so doing they will after that time be forever barred of all right to recover the same in the courts of justice."

Paragraph seven, on p. 93, closes the Principles with the declaration, as a warning to all claimants of land, that "the titles of all lands, whether rightfully or wrongfully claimed, either by natives or foreigners, in the entire Kingdom, which shall not have been presented to this Board for adjudication, confirmation or rejection, on or before the 14th day of February, 1848, are declared to belong to this Government by Section 8 of the Article creating this Board. Parties who thus neglect to present their claims, do so in defiance of law, and cannot complain of the effect of their disobedience."

This construction put upon the statute—that a failure to present a claim within the prescribed time absolutely barred the claimant—by the Legislative power of the Kingdom, the King and the Nobles and Representatives, and uniformly concurred in and acted upon by successve Governments under many reigns following, and, to this day, undisturbed by any judicial decisions, we are not at liberty to disregard.

What, then, was the title or claim to this land which Lot Kamehameha had at the institution of the Land Commission? It was a right to present a claim for this land to the Land Commission, and which claim if sustained by evidence, would have entitled him to an award therefor, or to a royal patent, signed by the King, upon his extinguishing the Government share therein—both award and patent being subject to the rights of tenants, if any there were.

It is claimed that a construction of Section 8 of the Act of 1845, which would deprive Lot Kamehameha of this land of which he then had possession, would conflict with the provision of the Constitution of 1840—or Declaration of Right, viz: "Protection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property, while they conform to the laws of the Kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws."

We interpret this to mean that whatever rights to land the chiefs and people had, were to be protected. Possession of land was not to be disturbed. The landlords were not to dispossess their tenants without cause, nor should the King dispossess his chiefs. See Laws of 1839 and 1840, found in Old Laws p. 33.

The statute therefore deprived Lot Kamehameha (on his failure to present his claim to the Commission) of what? Not of this land, for he had no title to it, but *only of his right to present a claim for it*, which was all the interest he had.

This interest or right the Declaration of Rights secured to him. "Nothing should be taken from him without express provision of the laws." And in 1845 "the express provision of the law" warned him that to secure his *title* to this land he must present his claim to it before the Commission within the time limited. We fail to see how the letter or spirit of the Constitution of 1840 is violated by the Act of 1845, constituting the Land Commission. Chiefs and people had at that time only a qualified right of possession to lands. They had no *titles* to them. The law afterwards, which was not inconsistent with the Constitution of 1840, but which was in furtherance of its guaranties, provided a method by which titles could be obtained.

Section 8 of this law (Act of 1845) is a general statute of limitation. *All* claims to land unless presented in time, were to be deemed invalid and shall be forever barred in law—excepting only in case of absentees, *i. e.*, "unless the claimant be absent from this Kingdom and have no representative therein." No exception is made in favor of infants. Statutes of limitation are to be strictly construed by courts of justice.

In *Demorest vs. Wynkoop*, 3 Johns. Ch. 129, Chancellor Kent says: "The statute has no saving clause for persons laboring under disability, but it is peremptory that no sale under such power shall be defeated to the prejudice of any *bona fide* purchaser, in favor of any person claiming the equity of redemption. Where the statute makes no exception, the Court can make none on the ground of any inherent equity applicable to infants." In reviewing the cases which enlarge upon the policy of statutes of limitation, to quiet possession and extinguish dormant claims, the Chancellor says: "According to an expression of Lord Eldon, a 'right might travel through minorities for two centuries.' It would be impolitic as well as contrary to established rule to depart from the plain meaning and literal expression of the proviso in the statute of limitations;" and on page 140 of the decision the Judge says: "The doctrine of any inherent equity creating an exception as to any disability, where the statute of limitation creates none, has been long and, I believe, uniformly exploded. General words in the statute must receive a general construction; and if there be no express exception, the Court can create none."

We believe this rule to be established beyond controversy.

Hall vs. Bumstead, 20 Pick., 8.
Beckford vs. Wade, 17 Vesey, Jr., 87.
Bell vs. Morrison, 1 Peters, 360.

This view is decisive of this case. The statute made no exception in favor of infants, and we can make none. By Section 7 of the Act creating the Land Commission, it was to make its decisions "in accordance with the principles established by the Civil Code of this Kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of *absentees*, tenancy and subtenancy—primogeniture and rights of adoption." * * *

It is to be noticed that the subject of "infancy" is not mentioned. This is an additional reason for not admitting the disability of infancy as an exception to the statute. Claims of infants were presented by their parents or guardians. A large number of awards to Lunalilo and Victoria Kamamalu show this. These high chiefs who succeeded to the lands of Kekauluohi and Kinau respectively, both being infants at the time of the presentation of their claims, received awards for land exceeding any other claimants in number and extent.

It is also very significant that Kekuanaoa, the father of Lot Kamehameha, presented other claims to land in behalf of his son, upon which awards were made. By the law of this country at that time he was the proper one to make such application. In *E. K. Laanui vs. Puohu et. al*, 2 Haw., 162, the Supreme Court per Allen, C. J., said: "By the common law of this Kingdom, prior to the enactment of a law regulating guardians and wards approved 4th August, 1851, guardians had from time immemorial possessed and exercised the absolute right to dispose of the real and personal estate of their wards as might suit their own will." The case of *Lot Kamehameha vs. J. D. Kahookano et al.*, 3 Haw., 118, has greater significance for the plaintiff is the same person from whom defendants claim in the case at bar. Here Kekuanaoa was not the probate guardian of Lot Kamehameha, but he was his father, and Judge Robertson, for the Court, says, as against the objection made, that he was not the guardian of the plaintiff's estate, and could not make a legal dedication of the right of way in question: "That Governor Kekuanaoa, in 1848, as the natural guardian of the plaintiff, rightfully had and exercised, under the law of this Kingdom, the control and management of the plaintiff's property, is, we think, too clear a proposition to admit of a question; and that any grant of way over the plaintiff's land, or *any conveyance whatever of any part of his estate*, made by Governor Kekuanaoa during plaintiff's minority, and before the enactment of Section 54 of the Act regulating guardians and wards passed on the fourth day or August, 1851, must be considered absolutely conclusive and binding upon the rights of the plaintiff is, in our opinion, equally clear."

Finding, then, that there was during all the time when claims for land were required to be made before the Land Commission, a person competent in all respects to make such claim for this land in behalf of Lot Kamehameha, the statute ran against him. The acts of Kekuanaoa as father and natural guardian of Lot Kamehameha bound his infant ward in respect to claims before the Land Commission as fully and conclusively as if they had been done by Lot Kamehameha himself, if of full age.

But it is said that an infant is not bound by the failure of his guardian to act for him when such failure is prejudicial to the minor. This would not be a true statement of the law as it existed in this country in 1848-9 (the time of the Land Commission), for if, as we have seen, the law was that *all* acts of a guardian or father (if no guardian be appointed) respecting the disposition of an infant's property bound the infant, his failure to present a claim for land is an "act," the consequences of which would be equally binding upon the infant. It must be admitted that, if Kekuanaoa had made an appearance before the Land Commission, and had disclaimed any interest of his ward in this land, or had surrendered the same by a conveyance, it would have bound the ward; and it follows as a natural inference that as some affirmative action was required by statute of all claimants to land, and as nothing was required of those who did not claim land, a failure to claim would mean the same thing as a formal declaration that the infant had no claim to the land.

But if it be conceded, for the purposes of argument, that inherent equity should make an exception in behalf of the minor in this case, how does the law regard his position? Considering the statute which barred all claims, unless presented to the Land Commission before 14th February, 1848, as, in effect, a judgment against the infant in respect to this land, it would be his right on arriving at majority to avoid the judgment by assertion of his claim to the land, and in excuse of his delay to assert his non-age at the time when claims should be presented. He became of legal age, 20 years old, on the 11th December, 1850. On the 26th August, 1847, the Legislature extended the powers of the Land Commission for taking testimony, examining, settling and awarding upon all such claims to land as shall have or may be presented to them prior to the fourteenth day of February, 1848, to one year—that is to the 14th February, 1849. And on the 13th June, 1848, their powers were further extended "for such a period as shall be necessary for the full and faithful examination, settlement and award upon all such claims as may have been presented to said Board," and on the 20th July, 1854, the Legislature passed an Act providing for the final dissolution of the Board on the 31st March, 1855. In this Legislature Lot Kamehameha was a member, having been admitted to the House of Nobles by an Act of the 12th May, 1852.

If his disability of infancy at the date when the time for presenting claims to the Land Commission expired, February 14, 1848, excepted him from the operation of the statute, it was his duty to assert his claim to this land within a reasonable time after his coming to full age. The Land Commission would, doubtless, have rejected his claim, if made, as being barred by the lapse of time—the statute making no exception in his favor. But if the law were otherwise, and his plea of infancy was good at any time, it was certainly good while the Land Commission, the only court of competent jurisdiction to decide upon his claim, was in existence. The knowledge that the functions of this Court would soon expire should have warned him to press his claim then. Moreover, if his disability was a good excuse in law for not preventing his claim to the Board, a *mandamus*, on his becoming of age, from the Supreme Court to the Board would have secured for him all the rights which he could have had by a presentation of his claim within the statutory time.

How can a mere claim to have his title to this land considered and adjudicated, be considered to have ripened into a perfect title at this late day, or rather into such a title as gives the devisees of his heirs-at-law a right of possession against the State?

There is no prescription against the State. *Lindsey vs. Miller's Lessee*, 6 Pet., 666. The Supreme Court of the United States say in this case: "It is a well settled principle that the Statute of Limitations does not run against a State. If a contrary rule was sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions until the Statute of Limitations shall run; and then they would become invested with the title against the Government and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the Government, to prevent this result. It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the Government." This was adopted in *Kahoomana vs. Minister of Interior*, 3 Haw., 635.

If the defendants show no title or right of possession to this land, their naked possession can never ripen into a title, however much it may afford ground for liberal dealing with them in negotiations for a title from the Government.

This case last quoted involved the question of ownership of land not covered by any award of the Land Commission, royal patent or deed from the King. The Land Commission did not award it, and the Court say: "By force and effect of the statutes above quoted (those now under discussion) it must be considered to still belong to the Government." The only difference between that case and the one at bar is, that in claims for lots in the towns there was in them no third class of persons, as chiefs or lords, having intermediary ownership over tenants, and the tenant got his claim awarded direct, paying commutation to the Government, and such a lot of land would escheat to the Government and not to the owner of the ili or ahupuaa from which it may originally have been taken.

The State in the case at bar claims the land as public domain, not awarded or granted to anyone. A decision that the defendants have the right of possession thereto though showing no title, would be equivalent to a declaration that defendants have a title in fee simple, although it is admitted that they have never commuted for the Government's right therein, for a right of possession as against the State would be good enough title to any land. If lands unawarded by the State are still the property of the State, those who occupy them are trespassers and must yield the possession on demand to the State which holds the title, since the right of possession follows the title. The most that can be said on behalf of the defendants is that whatever claim they may have is an equitable one, and this would be no defence to an action of ejectment.

Having found that the infancy of Lot Kamehameha is no defence to this suit, we find upon principle and authority that the plaintiff, upon all the facts, is entitled to recover possession of the land described in the declaration, and accordingly order judgment to be entered in his favor, as in the nature of a judgment, *non obstante veredicto*.

A. S. Hartwell, for plaintiff; P. Neumann and F. M. Hatch, for defendants.

Honolulu, January 3, 1889.

Concurring opinion of Mr. Justice McCully.

The Court, sitting in this ejectment case without a jury, delivers the rule of law and a special verdict in its decision. It has held that lands not awarded by the Land Commission (presumably excepting the lands reserved by the King, and which have since become the Crown Lands) became the property of the Hawaiian Government, all right to make a claim for them having been barred by the provisions of Section 8 of the statute creating the Land Commission.

But it has held that the claim of one who was a minor at the date when the right of application closed, was by exception not barred, and that it having been proved that Lot Kamehameha was a minor at that date, it finds a verdict for the defendants.

The case before us cannot be considered apart from its public and historical relations. At the time of the *Mahele*, and of the institution of the Board of Land Commissioners, and the legislative ratification of the Prin-